PEDRO BAY CORP.

IBLA 87-236 Decided October 26, 1989

Appeal from the decision of Administrative Law Judge Harvey C. Sweitzer dismissing the contest complaint against Native Allotment Act application A-067524.

Affirmed.

1. Alaska: Native Allotments

> An applicant for an allotment under the Native Allot-ment Act has a vested right to the land when he has filed an application and completed 5 years of substan- tially continuous use and occupancy and may be deemed to have abandoned his claim only when he either knowingly and willingly relinquishes it or fails to proceed with it and intends to abandon it.

2. Alaska: Native Allotments

> When an applicant for an allotment under the Native Allotment Act demonstrates by a preponderance of the evidence that he has complied with the requirement that he complete 5 years of substantial actual possession and use of the land for which he has applied in a manner at least potentially exclusive of others, his application should be approved.

APPEARANCES: Robert M. Goldberg, Esq., Anchorage, Alaska, for Pedro Bay Corporation; Mark Regan, Esq., Alaska Legal Services Corporation, for Willis Roehl.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Pedro Bay Corporation has appealed the decision of Administrative Law Judge Harvey C. Sweitzer issued on November 26, 1986, after conducting the hearing in the contest we ordered in Pedro Bay Corp., 78 IBLA 196, 202-04 (1984). Judge Sweitzer held that Native Allotment Act applicant Willis Roehl, the contestee, had shown by a preponderance of the evidence that he had met the requirement of 5 years of substantially continuous use and occupancy, at least potentially exclusive of others, from 1964-69. 43 CFR 2561.2, 2561.0-5(a). See Ira Wassillie (On Reconsideration), 111 IBLA 53,

59-60 (1989); United States v. Estate of George D. Estabrook, 94 IBLA 38, 45, 51-52 (1986). Judge Sweitzer also held Roehl had not ceased to use and occupy the land. Appellant argues the facts do not support either holding.

In our 1984 decision in this case, we held that Roehl did not have a vested right to the land by virtue of having filed an application for a Native allotment and completed 5 years of use and occupancy because the Bureau of Land Management (BLM) had rejected his application in 1967 and had not reinstated it until 1979:

> In this case * * * the earliest that Roehl's right could have vested was upon reinstatement of the application by BLM in 1979. When he originally filed the application in 1966 he had not com- pleted the required use and occupancy. When he allegedly com- pleted the use and occupancy in 1969, he had no outstanding application because it was rejected finally in 1967. After the 1967 rejection, as discussed in [United States v. Flynn, 53 IBLA 208, 88 I.D. 373 (1981)], Roehl had only a right of possession based on continuing use and occupancy. Cessation of his use and occupancy for a period of time sufficient to remove evidence of a present use, occupancy or claim to the land would have terminated his right to the land under the Native Allotment Act and restored the land to its original status of vacant and unappropriated land open to the initiation of rights by others. [Emphasis in original.]

78 IBLA at 204. As a result, we said, "for Roehl's right to this allot- ment to have vested in 1979 he must have completed 5 years' sufficient use and occupancy and maintained possession of the land sufficient to have put others on notice of his claim, thereby barring initiation of any conflict-ing rights." Id.

[1] It was revealed at the hearing, however, that Roehl had, before March 2, 1967, 1/ in response to a request of the Bureau of Indian Affairs (BIA), submitted a second application, for the same land described in the original application, that was never forwarded to BLM (Tr. 434; see Exh. G). As we have noted, pursuant to the guidelines issued on October 18, 1973, by Assistant Secretary Jack O. Horton a Native allotment application which was received by BIA prior to December 18, 1971, is considered to be pending before the Department as of that date within the meaning of the savings provision of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617(a) (1982), even if BIA failed to timely transmit the application to BLM. See generally Nora L. Sanford, 43 IBLA 74 (1979); Julius F. Pleasant, 5 IBLA 171 (1972). Similarly, in this case, our prior statement, based on the incom- plete record before us, that Roehl "had no outstanding application" in 1969, was incorrect. The existence of this second application means that, if Roehl had complied with the use and occupancy requirement by 1969, then his interest in the land was vested at that time and could only be abandoned

1/ BIA's letter to Roehl acknowledging receipt of the second application is dated Mar. 2, 1967 (Exh. I).

if he intended to do so. United States v. Flynn, 53 IBLA at 235, 88 I.D. at 388. And Roehl's testimony is clear that he did not intend to abandon his claim to the land (Tr. 357-58, 374-75). Under these circumstances we need only consider whether Roehl established that he had used and occupied the land for 5 years in a manner potentially exclusive of others.

[2] Roehl testified he built the foundation of a cabin near the schoolhouse in the village of Pedro Bay in the spring of 1963 (Tr. 340, 341), staked it (Tr. 343-44), and built the cabin itself in the spring of 1964 (Tr. 340-41, 353). He also had an outhouse and a fishrack or two (Tr. 346). He used the land to obtain drinking water (Tr. 346-47), for picking berries (Tr. 348, 365), and for trout fishing (Tr. 349, 365). He lived in the cabin with his family in the winter of 1964 (Tr. 353). His wife stayed there in the summer of 1965 (Tr. 353), and he returned there from summer commercial fishing in the fall before moving to Anchorage (Tr. 354). He invited the Smollens family to live in the cabin during the winter of 1965 (Tr. 376). In the spring of 1966 he and his family returned to Pedro Bay to live (Tr. 355-56, 358-60). They spent the winter of 1966-67 there (Tr. 360). His family stayed there in 1967 while he went commercial fishing in the summer and until September of that year (Tr. 361, 367-68, 399). He and his family stayed with his sister in Iliamna that fall and the winter of 1967-68, returning to Pedro Bay occasionally and for Christmas, and the next spring he returned to Pedro Bay (Tr. 362, 367-68, 395-96, 398). In the fall of 1968, after summer commercial fishing, Roehl took a con- struction job in Iliamna and visited his family in Pedro Bay on weekends (Tr. 362-64). In the winter of 1968-69 he worked in Iliamna (Tr. 364). In the summer of 1969 he went commercial fishing and then returned to Pedro Bay with his family (Tr. 365). In the fall of 1969 Roehl and his family moved into a rented house in Newhalen (Tr. 366). In December 1969 he and his family returned to Pedro Bay for a short time and then in the winter of 1969-70 he and his family moved into a cabin he had built in Iliamna, and his brother and wife moved into the Pedro Bay cabin with his permis- sion and lived there for the winter with their mother and younger sister (Tr. 373, 400-401). Roehl described a footpath running through the land for which he applied that had existed for many years and was generally used by people who were going berrypicking or fishing (Tr. 347, 349, 351-52).

Based on an evaluation of this testimony, as well as testimony of other witnesses that corroborated or contradicted it to a greater or les- ser extent, Administrative Law Judge Sweitzer concluded that Roehl had established by a preponderance of the evidence that he had used and occu-pied the land he had applied for in a continuous manner, potentially exclu- sive of others, from at least May 1, 1964, to May 1, 1969 (Decision at 19- 20). Although we normally defer to findings of fact that are based upon a weighing of contradicting evidence, we may make our own review of, and draw our own conclusions from, the record. United States v. Chartrand, 11 IBLA 194, 212, 222, 80 I.D. 408, 417, 422 (1973); Ira Wassillie (On Reconsider-ation), supra at 58-60. In this case, our own review of the record leads us to the same conclusion as Administrative Law Judge Sweitzer came to: Roehl's Native Allotment Act application should be approved.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Sweitzer is affirmed.

Will A. Irwin
Administrative Judge

I concur:

James L. Burski
Administrative Judge